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No. .....

In The Supreme Court of The United States

OCTOBER TERM, 1974

73-1466

MARK HOPKINSON, ET AL
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 4, 1974.

OPINION BELOW

A written opinion was issued on March 4, 1974, but is not yet reported. A copy of this opinion is attached as the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1974. No petition for rehearing was filed. This

petition for certiorari is filed within thirty (30) days of the date of entry of the judgment of the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the trial court properly admitted into evidence testimony revealing that the petitioners had engaged earlier in other criminal activity.

2. Whether the court of appeals erred in holding that the trial court properly admitted into evidence testimony of a customs agent as to the value of the marijuana in question.

3. Whether the court of appeals erred in holding that the trial court properly denied the petitioners' motions for judgments of acquittal based on the theory of entrapment and properly refused to instruct the jury on the issue of entrapment.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V:

> "No person . . . shall be deprived of life, liberty, or property, without due proces of law. . . ."

STATEMENT OF THE CASE

In the latter part of 1972, a federal grand jury for the District of New Hampshire returned a two-count indictment charging that Mark Hopkinson, James Mancini, and Robert DePietro: 1) possessed 286,984 grams of marijuana with the intention of distributing it, and 2) conspired with each other to import illegally that same amount of marijuana.

On January 9, 1973, the grand jury returned a second indictment, identical to the first, but with the additional charge of illegal importation. The first indictment having been dismissed, a United States Magistrate's Recommendation of January 30, 1973, made with the assent of both counsel, transferred all pre-trial and discovery orders made in the first indictment to the second. The defendants pled not guilty.

On April 9, 1973, the defendants commenced a jury trial in United States District Court for the District of New Hampshire before Bownes, J. On April 17, defendant DePietro's motions for judgment of acquittal on the conspiracy and importation charges were allowed. Two days later, the jury returned its verdicts in the following manner: Defendants Hopkinson and Mancini were each found guilty of possession with intent to sell and conspiracy to import, but no verdict was reached on the importation count. As to the defendant DePietro, he was found not guilty of possession with intent to distribute, but guilty of the lesser included offense of possession.

On May 14, 1973, the Court sentenced Hopkinson and Mancini to five years imprisonment on both counts, the terms to be served concurrently. Defendant DePietro was given a one year suspended sentence and two years probation. All defendants were admitted to bail pending their appeal.

At trial, the following events occurred. United States Customs Special Agent Robert May testified that he received information that an aircraft was parked at the Corpus Christi International Airport that might be involved in the illegal importation of marijuana. (Tr. 60). Upon

traveling to the airport, Mr. May observed a Piper "Cherokee 6" aircraft; four of its six passenger seats had been removed from the plane's interior. (Tr. 61). About 10:00 P.M. that night, May watched as an individual, later identified as Patrick Heffernan, got into the plane and flew off in a southerly direction.

At about 1:00 A.M. on the morning of August 17, 1973, Agent May observed the plane return to the Corpus Christi airport, still under the control of Mr. Heffernan. As Heffernan was securing the craft, Agents May and Sam Hale accosted him, and told him that they would have to inspect the contents of the plane for contraband. After they obtained the key from him, they entered into it. (Tr. 73). As soon as they gained access to the plane, they detected a strong odor of marijuana. The craft, previously empty, now contained eighteen boxes with "markings in the Spanish language" on them. (Tr. 72). At this point, the agents placed Heffernan under arrest, gave him his *Miranda* warnings, and transferred the boxes from the plane to their own vehicles. (Tr. 78).

After Heffernan was taken into custody, a discussion ensued between him and agents of the Bureau of Customs. The result of this interview was that Heffernan agreed to go through with a "controlled delivery" of the marijuana to the person or persons, if any, with whom he was associated. (Tr. 79-80). At about 5:20 P.M. on August 17, 1972, then, the cartons having been reloaded into the aircraft, Heffernan departed from Corpus Christi in the same Cherokee 6 in the custody of Special Agents Raymond Halfacre and Thomas Ormon. (Tr. 80). Both Halfacre and Ormon were licensed pilots. The trip, which began at 5:20 P.M. on August 17 in Texas, ended at about 7:15 P.M. on

August 18 in Nashua, New Hampshire, with stops along the way in Tennessee, Virginia, and Bedford, Massachusetts. (Tr. 192, 421-24).

On direct examination, Patrick Heffernan testified as to his involvement with the marijuana. He stated that on June 10, 1972, he flew to Tucson, Arizona in compliance with a request from defendant Mancini. Upon arrival he was met by defendant Hopkinson and a younger brother of Mr. Mancini's. (Tr. 298) (Both Mancini and Hopkinson are residents of Arizona). In a conversation that ensued, Mr. Hopkinson asked Heffernan if he would be interested in participating in an armed robbery for that same night. (Tr. 305).

A bench conference was held at this point during the trial in which defense counsel moved for mistrial on the ground that an armed robbery on June 10 was immaterial to an indictment charging importation of marijuana on August 18. The Court asked the Assistant United States Attorney for an offer of proof. He answered:

> That they [Heffernan, Mancini, Hopkinson] stole $25,000.00 from a drug dealer, and they took the $25,000.00 and bought 225 pounds of marijuana, Mancini and Heffernan drove it to Boston and sold it, and then the plans were formulated to rent the airplane, and Heffernan would fly to Mexico and fly back the shipment, which was apprehended by the Customs officials. (Tr. 306).

The Court overruled defense counsel's objection, subject to the condition that the above transactions be "proven to be part of the plan and conspiracy". (Id.). None of the events

heading in a southerly direction for Boston. (Tr. 429). They were all arrested and taken into custody by federal, state, and local police about two miles north of the Massachusetts border. (Tr. 432). Also seized were the cardboard cartons containing what was later chemically analyzed to be marijuana. Its weight was determined to be 286,984 grams, or approximately 600 pounds.

REASONS FOR GRANTING CERTIORARI

The petitioners contend that the court of appeals has decided substantial federal questions contrary to certain fundamental Constitutional principles.

I. THE HOLDING OF THE COURT OF APPEALS THAT THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TESTIMONY REVEALING THAT THE PETITIONERS HAD ENGAGED EARLIER IN OTHER CRIMINAL ACTIVITY IS CONTRARY TO THE PRINCIPLES OF DUE PROCESS.

At trial, evidence of the defendants' involvement in three criminal events not alleged in the indictment was received for the jury's consideration. These events were: 1) Defendants Hopkinson and Mancini, with the aid of Government witness Heffernan, committed an armed robbery in June, 1972, in Tucson, Arizona. 2) The same three men imported illegally two hundred and twenty-five (225) pounds of marijuana from Mexico into Tucson, Arizona, in or about the second week of July, 1972. 3) Hopkinson's statement to Heffernan, and introduced through the latter, that he "had done this in the past", referring to the illegal importation of marijuana. These errors, if they are so held to be, were properly saved for appellate review by excep-

tion in the case of the first two, and motion for mistrial in the case of the third. It is defendants' contention that none of the three events should have been admitted at trial, and that they were thereby prejudiced.

The fiirst two illicit transactions alluded to will be dealt with together. At the first sign during the trial that evidence of an armed robbery would be put in as part of the Government's case, counsel asked for, and received, a bench conference on the matter. The Assistant United States Attorney's offer of proof was:

> That they [Heffernan, Mancini and Hopkinson] stole $25,000.00 from a drug dealer, and they took the $25,000.00 and bought 225 pounds of marijuana, Mancini and Heffernan drove it to Boston and sold it, and then the plans were formulated to rent the airplane, and Heffernan would fly it to Mexico and fly back the shipment, which was apprehended by the Customs officials. (Tr. 306) (emphasis added).

The law on the admissibility of other crimes to help prove the commission of the indicted crime is frequently stated, but difficult to apply. The broad rule most often applied is that:

> Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. *People* v. *Moli-*

neux, 168 N.Y. 264, 61 N.E. 286, 294 (1901).

In the federal courts, this general rule has been followed in *Robinson* v. *United States,* 459 F.2d 847 (D.C. Cir. 1972). The First Circuit Court of Appeals has adopted part of the general rule as to the "generally accepted principle of law that prior similar acts are admissible to prove intent". *New England Enterprises Inc.* v. *United States,* 400 F.2d 58, 70 (1st Cir. 1968). See also *Whiting* v. *United States,* 296 F.2d 512 (1st Cir. 1961). Also to the same effect, although apparently not the law at the time of trial, is Rule 404(b) of the Federal Rules of Evidence, which generally excludes "evidence of other crimes", but does not exclude "evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." [The Rules took effect on July 1, 1973, and are applicable to "actions and proceedings brought thereafter and also to further procedure in actions and proceedings then pending . . ." Although not explicit, it would seem that the "further . . . actions and proceedings" contemplates further *evidentiary* proceedings, not the bringing of an appeal. The trial in the instant case was concluded in April, 1973.]

The offer of proof advanced by the Assistant United States Attorney was deficient as an attempt to get the other-crimes evidence admitted. A summary of the offer was that the defendants stole some money, that they purchased and sold 225 pounds of marijuana, and that thereafter, plans were formulated to rent the airplane and import the larger quantity of marijuana. The most that can be said, after reviewing the pertinent evidence, is that the three events happened near each other in time. There was no showing, which the defendants submit is required,

that the money used to pay for the 225 pounds of marijuana was directly traceable to the money obtained from the armed robbery, and that the money used to purchase the 625 pounds of marijuana was directly traceable to the sale of the lesser amount of narcotics. Another circuit court of appeals has held that other-crime evidence may be admitted when the two are "so blended or connected .... that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged." *United States* v. *Wall*, 225 F.2d 905, 907 (7th Cir. 1955). It is submitted that the extraneous crimes admitted in the instant case were not so inextricably linked with each other that proof of the first two tends to prove the third. The more realistic view of the situation was that the armed robbery and the sale of the lesser amount of drug was offered to show, and did show, merely that defendants were unsavory characters, human beings with a general disposition towards committing crimes. All authorities reject this approach. *United States* v. *Bobitt*, 450 F.2d 685 (D.C. Dir. 1971); *United States* v. *Bradwell*, 388 F.2d 619 (2d Cir. 1968); *United States* v. *Hamilton*, 455 F.2d 1268 (3d Cir. 1972); Federal Rules of Evidence, Rule 404(b); II Wigmore on Evidence, § 305 (3d Ed. 1940).

Reviewing the usual exceptions to the general rule of exclusion of evidence of other crimes one by one, it can be seen that the armed robbery and the sale of the lesser amount of marijuana do not fit anywhere therein. Motive is not an element of the offense charged, but from other legally approved evidence, it could be assumed that profit served as the inspiration for the commission. Proof of robbery and sale of drugs does not prove intent to sell a larger amount at a later date. There was no question raised as to accident or mistake. Proof of the earlier crimes does

not tend to establish the indicted crime, except for bad character, forbidden by the authorities above-cited. Nor do the earlier ones tend to establish the identities of the defendants, since there was no peculiar modus operandi which would somehow set the defendants apart as the ones that sold the 625 pounds of marijuana.

While all the cases and argument presented above, in defendants' view, show that the armed robbery and the sale of 225 pounds of marijuana should not have been allowed into evidence at trial, and that it was reversible error to have done so, the rule of exclusion must apply even stronger to the statement admitted into evidence by Government witness Heffernan that Hopkinson told him that he "had done this in the past". (Tr. 321). The admission, in the context of the trial, did not relate to the indicted crime, or even the sale of the lesser amount of marijuana. Rather, it related to an illegal transaction that occurred sometime well before the summer of 1972. There was absolutely no showing that this past alleged activity was in *any manner* related to the indicted incident. Such evidence was legally irrelevant to the charge of importation of 625 pounds of marijuana in August, 1972, yet must have inestimably tarnished Hopkinson's character, as well as that of his associates and co-defendants in the minds of the jury.

For all of the above-given reasons, it is submitted that defendants' motion for mistrial and objections to the evidence of the armed robbery and the sale of 225 pounds of marijuana should have been granted, as well as the same motions on the evidence with respect to Hopkinson's statement that he "had done this" before.

II. THE HOLDING OF THE COURT OF APPEALS THAT THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TESTIMONY OF A CUSTOMS AGENT AS TO THE VALUE OF THE MARIJUANA IN QUESTION IS CONTRARY TO THE PRINCIPLES OF DUE PROCESS.

During trial, Special Agent Glendon Howson testified that he was the Assistant Special Agent in charge of the enforcement of the illegal importation of contraband into the New England District, although he never personally participated in an illicit sale of drugs in the Boston area during 1972. (Tr. 1109). Nevertheless, the Court allowed Mr. Howson to testify as to the "street value" of a pound of marijuana during that period in that locale; the figure given was two hundred dollars ($200.00) per pound. (Tr. 1108). This opinion was seasonably objected to. (Tr. 1107). It is submitted that for two reasons, the allowance of this estimate was error, and that defendants were prejudiced thereby.

That the admission of the value of the marijuana was harmful cannot be denied. It is one thing for a juror to contemplate a number of cartons of marijuana in front of him, and to realize that he is charged with the responsibility of determining in an impartial manner whether the defendants on trial were the persons who illegally imported it into the country. But to be given a price-tag on the contraband, a value that reaches well over one hundred thousand dollars, is to throw an unnecessary stress on the juror to find the defendants responsible for bringing it in, and punishing them. It is no secret that some individuals do not earn in ten years what the defendants were allegedly going to gross in one or two months. Resilient would be the juror

who could stand the shock of realizing this fact, and yet make an impartial determination of whether the defendants were not guilty of the crimes charged.

The most obvious argument for the inadmissibility of the value of the drug is its relevancy. Courts have long strained to insure that only evidence which has a bearing on a fact in issue is received for the fact finders' consideration. *Guthrie* v. *United States*, 207 F.2d 19 (D.C. Cir. 1953); *Herzog* v. *United States*, 226 F.2d 561 (9th Cir. 1955); Federal Rules of Evidence, Rule 402. The "street value" of the marijuana in nowise tends to show that the defendants conspired to import the drug, that they imported it, or that they possessed it with the intention of distributing it. Whether the figure given was one dollar per ton, or a hundred dollars per ounce, they provide no inferences as to the crimes charged.

A second snag as to the admissibility of the marijuana's value is that it is hearsay-ridden. Since Agent Howson admitted that he had no direct participation in an illegal sale of the narcotic, it is plain that either he was told of that figure or that he read it somewhere. The cases are unanimous in excluding prejudicial hearsay evidence from a trial. *Jones* v. *United States*, 385 F.2d 296 (D.C. Cir. 1967); *United States* v. *Markis*, 352 F.2d 860 (2d Cir. 1965); *Whiting* v. *United States*, 296 F.2d 512 (1st Cir. 1961); *Gambino* v. *United States*, 108 F.2d 140 (3d Cir. 1940). Even the Federal Rules of Evidence, Rule 802, excludes hearsay evidence (with exceptions not pertinent here).

For the reasons given above, then, it is submitted that prejudicial error occurred in the admission into evidence at trial of the "street value" of the marijuana.

III. THE HOLDING OF THE COURT OF APPEALS THAT THE TRIAL COURT PROPERLY DENIED THE PETITIONERS' MOTIONS FOR JUDGMENTS OF ACQUITTAL BASED ON THE THEORY OF ENTRAPMENT AND PROPERLY REFUSED TO INSTRUCT THE JURY ON THE ISSUE OF ENTRAPMENT IS CONTRARY TO THE PRINCIPLES OF DUE PROCESS.

At the conclusion of the Government's case, the trial court denied the defendants' requests for judgments of acquittals on all counts. (Tr. 1207). At the end of trial, the court refused to instruct the jury on the issue of entrapment. (Tr. 1534). It is submitted that the court erred on both points.

In *United States* v. *Russell*, 93 S. Ct. 1637 (1973), this Court defined the defense of entrapment in criminal prosecutions. In that case, this Court reaffirmed the *general* rule that the question to be decided when entrapment is raised as a defense is not how much the Government actually participated in the crime, but rather, the existence or nonexistence of defendants' predisposition to commit it. However, at page 1643, the Court was careful to re-acknowledge that:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would be absolutely bar the government from invoking judicial processes to obtain a conviction. . . .

The defense of entrapment based on police conduct, then, survives *Russell*, although it is apparently circumscribed.

In the instant case, Customs Agents intercepted Hefferman in Corpus Christi, Texas. Following an agreement with him, they embarked on a 2500 mile flight under their control. Although Hefferman did some of the piloting, he was in fact in Government custody. (Tr. 155, 156, 157, 159). All expense were paid by the Government, including gasoline, airport fees, and motel fare. It is plain that if the aircraft developed engine trouble, or had other problems, those expenses, too, would be solved through the courtesy of the Government. The bait was more than served on a silver platter to the defendants; it was forced down their mouths. In *Rochin* v. *California*, 342 U.S. 165 (1952), cited in *Russell* as the kind of conduct that law enforcement authorities still cannot engage in, police extracted evidence by pumping the defendants' stomach. Here, Customs Agents effectively did the reverse.

Cases decided prior to *Russell* offer little aid to the determination of the present issue, since that case apparently erased much of the earlier law. However, the defense still has vitality, even where there is a showing of pre-existing disposition to commit the crime. The Due Process clause still forbids the police to engage over-extensively in the commission of crime. 93 S. Ct. at 1643. What that quantum of activity is should at least have been submitted to the jury. See Note, 73 Harvard Law Rev. 1333, 1344 (1960); A.L.I. Model Penal Code, Comment to Section 2-10 (Tent. Draft No. 9, 1959); Wright, Federal Practice and Procedure, § 495 (1969) ("In most cases, however, the issue, where raised, will be for the jury, and the Court must instruct the jury about it.") In *United States* v. *Riley*, 363 F.2d 955, 959 (2d Cir. 1966), the Court held: "[T]he issue must be submitted to the jury, if there is any evidence negating predisposition, whether in cross-examination or otherwise, *no*

matter how unreasonable the judge would consider a verdict in favor of the defendant to be" (emphasis added). See also, *United States* v. *Workopich*, 13 Cr. L. 2298 (5th Cir. June 5, 1973).

For these reasons, the defendants contend that the Court erred both in failing to grant their motions for judgment of acquittal, and requests for instructions to the jury, based on the issue of entrapment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

ALFRED PAUL FARESE
Attorney for Petitioners

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 73-1301

UNITED STATES OF AMERICA,

APPELLEE,

v.

MARK HOPKINSON ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Albert H. Russell, Jr., with whom *Alfred Paul Farese* was on brief, for appellants.

James J. McLaughlin, Attorney, Criminal Division, Department of Justice, with whom *William J. Deachman*, United States Attorney, was on brief, for appellee.

March 4, 1974

CAMPBELL, *Circuit Judge*. Hopkinson, Mancini and DePietro were indicted for possession of 286,984 grams of marijuana with intent to distribute, illegal importation, and conspiracy to import.[1] Following a jury trial, Hopkinson and Mancini were found guilty of possession with intent to distribute and conspiracy to import, but the jury was unable to reach a verdict on the importation count against them. The court granted DePietro's motions for acquittal of conspiracy and importation, and the jury found him guilty only of simple possession, 21 U.S.C. § 844(a), rather than possession with intent to distribute.

[1] In violation of 21 U.S.C. §§ 841(a)(1), 952(a), 963.

A government agent testified that he had observed Heffernan, an unindicted co-conspirator, leave from a Texas airport in a small empty aircraft and return several hours later with 18 Spanish-marked boxes of marijuana. After he was arrested, Heffernan agreed to complete his delivery exactly as previously arranged—only under the control of government agents—and he flew to New Hampshire where he was met by the three defendants. Heffernan was a principal witness for the government at the trial.

Appellants contest several evidentiary rulings and the court's failure either to grant their motions for acquittal based on entrapment or to give their requested jury instructions on entrapment.

The first three asserted errors concern the admission of testimony revealing that Hopkinson and Mancini had engaged earlier in other criminal activity, namely armed robbery and illegal importation and distribution of marijuana.[2] But the prior incidents were part of a continuing scheme to establish a large scale marijuana distributorship. There was testimony that "[t]he purpose of getting the [robbery] money was . . . to set up a distributorship for marijuana in the United States." Following the robbery, Hopkinson and Mancini imported 225 pounds of marijuana from Mexico; Heffernan testified Hopkinson,

> "wanted to know what price we could get for the marijuana in Boston, how soon we could get rid of it, because he had to pay his suppliers back in Mexico, and how soon we could expect to get enough money for the flight down to Mexico for the downpayment and cost of the aircraft."

When the first marijuana lot was being sold, Hopkinson and Heffernan discussed details of the importation conspiracy charged in the indictment. Mancini, who had

[2] The court repeatedly cautioned the jury that the testimony was not evidence against DePietro.

received large payments for deliveries from the 225 pound lot, provided Heffernan with funds to pay the downpayment on the aircraft and to finance the Mexican venture. Evidence of prior criminal activity "is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object . . ." *Green* v. *United States*, 176 F.2d 541, 543 (1st Cir. 1949). Here the prior history fleshed out the circumstances of the later conspiracy. The earlier marijuana importation and subsequent sale were, moreover, admissible as prior similar acts to prove intent to distribute. *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 70 (1st Cir. 1968).

Also objected to was Heffernan's testimony that Hopkinson asked him if he would be willing to fly marijuana from Mexico into the United States and "that it would be minimal risk, because he [Hopkinson] had done this in the past, and he had a very good contact in Mexico and I would be very safe." While the reference to prior importations was, by itself, irrelevant, the statement as a whole was relevant to the conspiracy to import, one aspect of which was Hopkinson's attempt to induce Heffernan to act as pilot. *Cf. United States* v. *Johnson*, 467 F.2d 804, 807 (1st Cir. 1972); *United States* v. *Ravich*, 421 F.2d 1196, 1204 (2d Cir. 1970). Had Hopkinson objected we would be faced with deciding whether the statement's legitimate probative value was outweighed by the possibility of prejudice. But Hopkinson did not object, nor did he ask for a limiting instruction. We cannot say that the court committed plain error nor see that the statement could have materially prejudiced Mancini who was not present during the conversation.

Appellants claim error in the admission into evidence of copies, not originals, of two rental contracts for a truck and aircraft. However, in the case of the Hertz truck rental agreement, it is now too late to raise the best evidence rule. At trial, defendants first objected without stating a reason. Later a reason was given to the effect that the signature on the form could only indicate a name but not identify the defendant, DePietro. That a copy, not an original, had been tendered was never mentioned. Failure at the trial to cite the best evidence rule deprived the government of an opportunity to take corrective measures. *Cf. Taylor* v. *Baltimore & O. R.R.*, 344 F.2d 281, 287-88 (2d Cir. 1965). There had, moreover, been no objection to the government's eliciting information from a Hertz employee concerning what the form showed about the type of vehicle rented, the location of the Hertz rental agency, and the date of the rental. Admission of the form as an exhibit added little to what the jury had already learned.

Appellants did register a timely best evidence objection to the introduction of the aircraft rental agreement. The objection was overruled without any preliminary finding that a reasonable search had been made for the original or that the original was unavailable through no fault of the proponent. *See Sylvania Electric Products, Inc.* v. *Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965).

However, when the rental agreement was introduced, Heffernan testified that it was his receipt for the contract he had executed in renting the aircraft. Although this circuit has not had occasion to express its view, and the rule varies among jurisdictions, there is strong authority elsewhere for admitting such a document as a duplicate original. *See* 4 Wigmore, *Evidence* § 1233 (Chadbourn

rev. 1972); McCormick, *Handbook of the Law of Evidence* § 235 (2d ed. 1972).[3] But we need not decide, since, even if it were not admissible, the error would be harmless. Heffernan had already testified, without objection, that the type of aircraft he needed was a Cherokee 6, that Lease-A-Plane had this type of aircraft, and that he had picked up an aircraft from that firm on August 8.

Appellants contend that the court erred in permitting a customs agent who was a "marijuana expert" to testify to the "street value" in Boston of a pound of marijuana. An opinion of value derived solely from reports from undercover agents and law enforcement agencies is inadmissible hearsay. *See* 3 Wigmore, *Evidence* § 719(2) (Chadbourn rev. 1970). However, since Heffernan had twice testified to the same per pound selling price, as well as to the net profit defendants planned to make on the sale, admission of the agent's corroborative testimony was harmless.

Appellants argue finally that the government's conduct in accompanying Heffernan, and paying for his travel expenses, was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell*, 411 U.S. 423, 431-32 (1973). Where the government merely encouraged Heffernan to proceed as planned, the contention is frivolous. The government did not supply Heffernan with the contraband or the cash for his purchase or the means for its delivery; nor did it in any conceivable fashion coerce defendants into accepting

[3] It can also be argued that the best evidence rule is not in point. The leasing or renting of property may be shown by secondary evidence such as oral testimony. If the present exhibit was secondary evidence, it might still be adequate to prove that a lease was executed between particular parties on a particular date. *See* 4 Wigmore, *Evidence* § 1242 *et seq.* (Chadbourn rev. 1972); McCormick, *Handbook of the Law of Evidence* § 233 (2d ed. 1972).

delivery. The government's activity did not raise a jury issue of entrapment; there was no evidence that the defendants were otherwise unwilling. *Cf. Kadis* v. *United States,* 373 F.2d 370 (1st Cir. 1967). Furthermore, the requested jury instructions misstated the law.

Affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX B

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 73-1301.

UNITED STATES OF AMERICA,
Appellee,

v.

MARK HOPKINSON ET AL.,
Defendants, Appellants.

JUDGMENT

Entered March 4, 1974

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Russell and McLaughlin.]